

## **CHAPTER 36**

### **ARMY ENVIRONMENTAL LAW: INTRODUCTION**

#### **I. A BRIEF HISTORY.**

- A. American society's widespread concern about the environment is a relatively recent development that has fueled rapid growth in environmental regulation. In 1970, there were only 500 pages in the Code of Federal Regulations (C.F.R.) devoted to environmental protection. Today, there are thousands of pages of environmental regulations in the C.F.R. implementing over 70 pieces of environmental legislation. In addition, many states have enacted environmental regulatory schemes that rival their federal counterparts in scope and complexity.
- B. DOD installations must interact with multiple sources of environmental regulators.
  - 1. At the federal level, most environmental statutes are primarily administered and enforced by the Environmental Protection Agency (EPA). EPA has divided the country into 10 regions. While subject to direction from EPA National Headquarters in Washington, D.C., each EPA region has a distinctive "personality" that is often displayed when enforcing environmental requirements at federal facilities.
  - 2. Increasingly, state and local agencies are administering and enforcing environmental requirements that impact on federal facilities. Some of these requirements are based on federal programs that have been delegated by EPA or other federal agencies to the state. Other requirements are unique to the state, or products of local initiatives. Typically, states assign principal responsibility for environmental regulation to various branches or divisions within their existing Departments of Natural Resources or Health.
  - 3. Compliance with U.S. environmental laws overseas.

- a. With the exception of the National Environmental Policy Act (NEPA) and its application to Antarctica, there is no direct application of U.S. laws to overseas operations (*see infra* Chapter II, section X). DOD has, however, decided to apply many U.S. standards via DoD Instruction 4715.5, Management of Environmental Compliance at Overseas Installations, 22 Apr 96 (replaces DoD Directive 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations, 20 Sep 91).
  - (1) Applies to all DOD components, including the Unified Combatant Commands.
  - (2) Explicitly does not apply to:
    - (a) The operations of U.S. military vessels or aircraft;
    - (b) Off-installation operational and training deployments; or
    - (c) The investigation or execution of remedial or cleanup actions necessary to correct environmental problems arising from past DOD activities.
- b. DOD establishes an overseas “baseline” document. The baseline will consist of standards applicable to similar operations conducted in the U.S.
  - (1) Once developed, the baseline will be compared with existing host nation law to develop country-specific environmental standards (i.e., Final Governing Standards (FGS)).
  - (2) After consultation with the U.S. Diplomatic Mission in the host country, the “Executive Agent” will determine whether to apply baseline standards or host nation standards. Ordinarily, the Executive Agent uses the most protective standard to establish the FGS.

- c. Waivers from applicable standards can be obtained from the Executive Agent where “compliance with the standards at particular installations or facilities would seriously impair their actions, adversely affect relations with the host nation or would require substantial expenditure of funds for physical improvements at an installation that has been identified for closure or . . . realignment. . . .” Consultation with the Diplomatic Mission must occur before compliance with a host nation standard is waived.
- d. Disposal of hazardous wastes in the host country will be limited to instances where:
  - (1) Disposal complies with the baseline guidance and any applicable international agreements; or
  - (2) Disposal complies with the baseline guidance and host nation authorities have concurred with disposal in their country.

C. The Unitary Executive Doctrine.

- 1. In most cases, federal environmental laws apply to federal agencies and their facilities. Enforcement of federal law against noncomplying federal agencies, however, has sometimes proven problematic. EPA cannot sue another federal agency and has been able to unilaterally issue compliance orders or assess fines only in very limited circumstances because of the "unitary executive doctrine." In 1987, Henry Habicht III, then the Department of Justice's Assistant Attorney General for the Land and Natural Resources Division, described the unitary executive doctrine as follows:

[T]he President has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibilities under Article II, even though Executive branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered to comply with an administrative order *without the prior opportunity to contest the order within the executive Branch*. (Emphasis in original).

--Environmental Compliance by Federal Agencies: Hearing Before the Subcommittee on Oversight and Investigations of the House Committee on Energy and Commerce, 100th Cong., 1st Sess., 210 (1987).

2. To resolve the inherent tension between the unitary executive doctrine and EPA's duty to regulate federal agencies, President Carter issued Executive Orders 12,088 and 12,146. Collectively these Executive Orders provide federal agencies with a dispute resolution process that offers federal agencies the opportunity to challenge the terms of an EPA proposed order through various levels of EPA's regional and national bureaucracy.

- a. Executive Order 12,088 provides in relevant part:

- (1) 1-602. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation [of an applicable pollution control standard] between Executive Agencies. . . . If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.
- (2) 1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

- b. Executive Order 12,146 provides in relevant part:

- (1) 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
- (2) 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding into any court, except where there is specific statutory vesting of responsibility for resolution elsewhere.

- c. Note that under Executive Order 12,088, resolution of disputes by OMB rests upon request of the EPA Administrator. Under Executive Order 12,146, on the other hand, either of any two disputing Federal agencies can submit the case to the Department of Justice (DOJ).
  - 3. Although the unitary executive doctrine does preclude civil judicial enforcement by EPA as an enforcement option against federal agencies, the Administrator may, however, request that DOJ initiate a civil suit against the contractor who administers any portion of the installation's environmental program.
- D. States have also experienced problems trying to force federal facilities to comply with state environmental requirements. While Congress has included a waiver of sovereign immunity provision in nearly all environmental legislation, courts have frequently found that the waivers were not broad enough to permit effective enforcement. Initially, disputes focused on whether federal facilities were required to obtain state issued permits. For example, in Hancock v. Train, 426 U.S. 167 (1976), the Court held that the waiver provision in the Clean Air Act (CAA) did not constitute the "clear and unequivocal waiver" required to constitutionally subject federal facilities to state permitting requirements. Congress responded to Hancock by amending the CAA waiver and ensuring that all environmental statutes passed or amended subsequently contained waivers of immunity that clearly required federal agencies to obtain applicable state permits. Congress' response to Hancock did not, however, answer the issue of whether or not states can impose fines on federal agencies for CAA violations at federal facilities. This and other sovereign immunity issues are addressed *infra* at section VI, para. D.
- E. DOD places considerable emphasis on dealing with environmental problems caused by past practices and in ensuring that current environmental standards are achieved at all facilities subject to regulation. More importantly, DOD's leadership has demanded that protection of the environment be considered part of the military's mission. As Secretary Cheney said in a 1989 memorandum to the Service Secretaries:

Federal facilities, including military bases, must meet environmental standards. Congress has repeatedly expressed a similar sentiment. As the largest Federal agency, the Department of Defense has a great responsibility to meet this challenge. It must be a command priority at all levels. We must demonstrate commitment with accountability for responding to the Nation's environmental agenda. I want every command to be an environmental standard by which Federal agencies are judged.

- F. The U.S. Army's Environmental Philosophy. In 1992, then Army Chief of Staff General Sullivan announced that as part of the Army's Environmental Strategy into the 21<sup>st</sup> Century that, "The Army will be a national leader in environmental and natural resource stewardship for present and future generations as an integral part of our mission."

## **II. THE JUDGE ADVOCATE'S ENVIRONMENTAL ROLE.**

- A. Army Regulation 200-1, Environmental Protection and Enhancement, 21 February 1997, makes JAGs responsible for:
1. Providing advice and guidance to commanders on their legal responsibilities for complying with all applicable environmental requirements.
  2. Providing guidance and legal opinions to commanders on the applicability of federal, state, local, and host nation laws and regulations governing hazardous materials for Army installations.
- B. In addition to the responsibilities outlined in AR 200-1, installation JAG offices should consider the following general guidance.
1. Each installation is to have an environmental law specialist (ELS).
  2. The ELS should be proactively involved in installation activities with potential environmental consequences. Starting point—membership on the installation Environmental Quality Control Committee (EQCC).
  3. Moreover, to protect the commander and ensure decision makers have the information they need to make good environmentally sound decisions, the ELS should:
    - a. Review environmental documentation and plans prepared by other agencies (e.g., Corps of Engineers and tenant commands).
    - b. Be advised of all environmental inspections by federal, state, local, or Army agencies.

- c. Participate in most environmental inspections from outside agencies, as well as internal and external Environmental Compliance Assessment System (ECAS) audits.
  - d. Receive a copy of all inspection reports, notices of violation, administrative orders, etc.
  - e. Participate in all environmental consultations.
  - f. Review all command environmental responses.
4. The ELS must be familiar with all federal, state, and local environmental compliance requirements affecting their installation. Equally important, the ELS must be fluent in the Army's program and requirements for environmental compliance.
5. To be effective, an ELS must be actively involved in internal environmental compliance inspections/audits of installation activities and facilities.
- a. By virtue of their training and experience, there are usually a number of personnel at an Army installation better qualified than the ELS to conduct an audit of an installation's activities for compliance with environmental requirements.
  - b. At a minimum, however, the ELS should meet with the audit team prior to the audit's initiation, review the audit protocol(s), and ensure that the audit team understands the environmental requirements applicable to the activities and facilities scheduled for auditing.
  - c. The ELS should stress during the pre-audit meeting that:
    - (1) Any limitations in conducting the audit should be clearly stated in the audit report (shortage of time, lack of supporting documentation, unavailability of key personnel, etc.).

- (2) All documents reviewed and persons interviewed that become the basis of findings should be clearly identified. Particularly significant documents should be copied and attached as enclosures.
  - (3) All conclusions stated in the audit report should be based on facts. Facts relied on should be cited as justification for each conclusion.
  - (4) Anecdotal information should be clearly identified and qualified as appropriate (e.g., "It was reported by Mr. John Smith, the assistant Sewage Treatment Plan Operator, that over the last year. . .").
  - (5) Recommendations for site-specific corrective action and ways to avoid or minimize future risks of noncompliance should be included as part of the audit report.
  - (6) The audit team should be primarily concerned with making **factual** observations and conclusions; **legal** conclusions **should not** be made a part of the audit report unless first reviewed for accuracy by an attorney.
- d. The ELS should also be familiar with the purpose of and procedures applicable to the Environmental Compliance Assessment System (ECAS) and participate in the ECAS process as appropriate. The Environmental Assessment Management (TEAM) Guide is the standard DOD protocol manual used by ECAS auditors. The TEAM Guide contains federal regulations, DOD Directives, and Executive Orders and is supplemented with an Army Manual and a state and local manual.
- (1) The ECAS is a centrally funded Department of the Army program established in 1992 and managed by the Army Environmental Center (AEC).
  - (2) MACOMs coordinate the scheduling of the triennial ECAS, provide oversight, and assist in the identification, planning, and programming for necessary corrective actions discovered in the ECAS process.

- (3) The program is intended to provide installation commanders with a tool for attaining, sustaining, and monitoring compliance with all applicable environmental laws and regulations.
- (4) External ECAS audits, using a team of independent assessors not associated with the installation, will be conducted at active Army installations every three years. Installations must develop management and funding plans to correct deficiencies identified during external assessments.
- (5) In addition to external audits, installations are responsible for performing annual internal audits, except in years when an external assessment is conducted. Installation personnel conduct internal assessments. Deviations from the annual internal audit cycle require MACOM justification and HQDA approval.
- (6) In the Reserve Component, the ECAS is known as the Environmental Compliance Assessment Army Reserve (ECAAR) and Environmental Compliance Assessment System - Army National Guard (ECAS-ARNG).

### **III. THE ENVIRONMENTAL QUALITY CONTROL COMMITTEE (EQCC).**

- A. Every installation, major subordinate command, and MACOM is required by AR 200-1, para. 15-11, to have an EQCC. Overseas, the EQCC may be organized at the military community level. The EQCC must include representatives from each major, sub-installation, and tenant activity. The EQCC membership will include representatives of the operational, engineering, planning, resource management, legal, medical, and safety interests of the command.
- B. The purpose of the EQCC is to advise the installation commander on environmental priorities, policies, strategies, and programs. The EQCC also coordinates the activities of environmental programs covered in AR 200-1.

- C. The installation commander or his designated representative **must** chair the EQCC. It is important that any delegate also be given authority to assign coordination responsibilities to resolve problems that are identified. The EQCC should normally meet monthly.
- D. At many installations, meetings of the entire EQCC on a monthly basis may not be practical. At a minimum, however, the ELS should meet formally on a monthly basis with the installation's environmental coordinator; representatives from the safety, training, and preventative medicine offices; and also with the direct overseers of the installation's building and maintenance activities. This "mini-EQCC" should examine all ongoing and upcoming installation activities for their environmental impacts and determine what, if any, permits or corrective actions are required. Informal discussion between members of the mini-EQCC should occur frequently on an "as needed" basis.
- E. Minutes of all EQCC and mini-EQCC meetings should be taken and maintained. A summary of the minutes should be provided to the chairman of the EQCC. The summary should highlight problems identified and recommend courses of action to resolve those problems. Problems that could result in adverse publicity for the installation or command should be discussed thoroughly with the installation's public affairs officer.

#### IV. ADDRESSING ENVIRONMENTAL NON-COMPLIANCE.

- A. Federal facilities are required to comply with applicable federal law and also state environmental laws that are encompassed by a waiver of sovereign immunity. A sample waiver of sovereign immunity reads as follows: "Each Federal agency shall be subject to and comply with all Federal, State, interstate, and local requirements, both substantive and procedural, respecting abatement and control of [air, water, etc.] pollution in the same manner, and to the same extent, as any person is subject to such requirements."

--Caution: this is a *sample* waiver provision. Each statutory waiver has its own unique language, and the applicable waiver must be reviewed in analyzing any specific problem.

- B. In determining whether or not a state environmental requirement is binding on a federal facility, use the following analysis:

1. Starting point: Hancock v. Train. Bottom line we need not comply unless Congress has relinquished federal supremacy -- (and we *cannot* pay money to the state unless Congress has authorized the expenditure).
  - a. Identify exactly what it is that the state is requiring us to do.
  - b. What waiver of federal supremacy is the state relying on?
  - c. Does the state requirement fit within the federal statutory program that creates the waiver? *See, e.g., Kelley v. United States*, 618 F. Supp. 1103 (W.D. Mich. 1985) (Clean Water Act (CWA) waiver does not render federal agency liable for violation of state law designed to protect underground water because the CWA generally does not address underground water issues); Goodyear Atomic Corp. v. Miller, 406 U.S. 174, 185-195 (1988) (dissenting opinion) (state work place regulatory scheme is not encompassed within the federal waiver of sovereign immunity regarding workman's compensation laws).
2. Are there other "defenses?"
  - a. What about exclusive federal legislative jurisdiction? While it should insulate a federal facility from state regulation, DOJ has declined to raise this defense.
  - b. Typical waiver language: ". . . in the same manner, and to the same extent as any person . . . ." Does state law discriminate (e.g., are municipalities or state agencies exempted)?
  - c. Does the state's law or regulation embody a "requirement" that is encompassed within the limits of the waiver of sovereign immunity?

- (1) Based on language in Hancock, some courts have distinguished between environmentally protective provisions of state law and remedial provisions, finding that the latter do not constitute "requirements." *See, e.g., Florida Dep't of Envir. Reg. v. Silvex Corp.*, 606 F. Supp. 159 (M.D. Fla. 1985) (state provision creating liability for environmental damage held not to be a "requirement" for purposes of the Resource Conservation and Recovery Act (RCRA)).
- (2) Has the requirement been regularly promulgated through a routine administrative process, or is it *ad hoc*?
- (3) Does the requirement mandate "relatively precise standards capable of uniform application?" Romero-Barcelo v. Brown, 643 F.2d 835, 855 (1st Cir. 1979), *rev'd on other grounds, sub nom. Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982) (criminal and civil nuisance statutes held not to create specific standards that a federal agency must adhere to); *see also Kelley v. United States*, 618 F. Supp. 1103, 1108 (W.D. Mich. 1985) (state statute proscribing discharging "any substance which is or may become injurious to the public health, safety or welfare" does not create a "requirement" that a federal agency must comply with).

C. If We Must Comply.

1. Make arrangements to do so, or
2. If there are problems, seek to negotiate a delayed compliance agreement with the state.
3. If only a portion of the state's requirements can be achieved immediately, negotiate a compliance timetable for actions that cannot be accomplished immediately.
4. **Caution:** do not negotiate an agreement with obligations that the command cannot meet.

5. **Caution:** note the fiscal law considerations discussed in Section IV F., below.
  6. Should we try to comply with state requirements even if we are not required to as a matter of law? Ask:
    - a. Will it improve our relationship with the regulators?
    - b. Is it the smart thing to do:
      - (1) Environmentally.
      - (2) Economically.
- D. Reporting Potential Liability of Army Activities and Personnel. *See*, AR 200-1, para. 15-7.
1. Criminal indictments or information against Army and civilian personnel for violations of environmental laws must be reported through command channels.
    - a. Criminal actions involving Civil Works activities or personnel will be reported to the Director of Civil Works.
    - b. Other criminal actions will be reported to the Director of Environmental Programs (DEP) and the Environmental Law Division (ELD).
  2. Enforcement action will be reported through the Army Compliance Tracking System Report (ACTS) to the AEC within 48 hours and any fine or penalty within 24 hours. Tenants are expected to notify the installation commander of enforcement actions with 24 hours.
  3. Any actual or likely enforcement action not involving Civil Works that involves a fine, penalty, fee, tax, media attention, or has potential or off-post impact will be reported through technical legal channels through the MACOM ELS to ELD within 48 hours, followed by written notification within 7 days. Subsequent reports should be provided whenever there is a significant development.

4. In accordance with AR 27-40, the ELD must be notified immediately of any service of summons, complaint, or other process or pleading commencing civil litigation against the United States or a soldier or employee. Actions involving Civil Works employees must be reported to the Chief Counsel, U.S. Army Corps of Engineers (USACE).
- E. Within 45 days of receiving a notice of violation (NOV), the installation will forward through command channels a plan for corrective action. The plan will include corrective milestones, cost estimates, and any associated 1383 report numbers.
- F. If an installation cannot immediately comply with state or federal environmental requirements, the ELS will help negotiate a delayed compliance schedule that can be achieved.
  1. Compliance orders/agreements may shield the command from citizen suits and other enforcement actions.
  2. On the other hand, the order/agreement can result in an obligation enforceable in court, through injunctions and possibly penalties for violations.
  3. **Compliance orders, consent agreements, and settlements are negotiated at the installation level, but must be coordinated with the ELD prior to being signed by the installation commander.** AR 200-1, paras. 1-7.d. and 15-8.
  4. **Caution:** the Anti-Deficiency Act, 31 U.S.C. § 1341 (ADA). Negligent violations of the ADA trigger a requirement that administrative discipline (up to removal from office) be imposed against the violator. Knowing and willful violation of the ADA can expose violators to possible criminal sanctions. 31 U.S.C. §§ 1349, 1350 and 1518, 1519. To avoid ADA violations:
    - a. Observe the limitations on using OMA funds for construction projects.
    - b. Avoid incurring an unconditional obligation to install pollution control equipment or otherwise spend money in future fiscal years in advance of an appropriation of funds.

- c. Include a condition that the required actions will be taken subject to availability of funds.
  - (1) If possible, condition actions upon the installation receiving funding that Congress authorizes **for the specific project necessary to achieve compliance**.
  - (2) Alternatively, make actions subject to funding that Congress authorizes for the project coupled with a commitment to request such funds (and then ensure that they are requested).
  - (3) Alternatively, condition actions upon the availability of funding allocated to the installation that can be used for the project.
  - (4) Alternatively, make actions subject to the availability of **any** funding that can be used for the project. This provision, if used, typically requires the installation to seek funding directly from its MACOM. It is particularly important, therefore, to coordinate closely with the MACOM before proposing the use of such a provision.

5. What about Presidential exemptions?

- a. The President may exempt federal activities from compliance with most environmental requirements for up to a year at a time if this would be in the paramount interests of the U.S. *See, e.g.*, 42 U.S.C. § 7418(b); and 42 U.S.C. § 6961(a).
- b. Presidential exemptions have been granted in a limited number of situations.
  - (1) President Carter exempted Fort Allen, Puerto Rico, from selected provisions of the CWA, RCRA, the CAA, and the Noise Control Act of 1972, in order to facilitate the relocation and temporary housing of Haitian and Cuban refugees. *See*, Executive Order 12244, Exemption for Fort Allen, 3 October 1980, 45 Fed. Reg. 66,443.

- (2) Pursuant to 40 C.F.R. § 1506.11, DOD was permitted to execute two missions in support of Desert Shield/Desert Storm without complying with the formal documentation requirements of the National Environmental Policy Act. DOD was, however, required to use "alternative methods of considering environmental impacts." *See*, Swenson, Desert Storm, Desert Flood: A Guide to Emergency and Other Exemptions from NEPA and Other Environmental Laws, 2 Fed. Facility Envtl. J. 3 (1991).
  - (3) More recently, President Clinton, for national security reasons, exempted the United States Air Force's operating location near Groom Lake, Nevada (Area 51?), from selected provisions of RCRA. *See*, Presidential Determination No. 95-45, Presidential Determination on Classified Information Concerning the Air Force's Operating Location Near Groom Lake, Nevada, 29 September 1995; Presidential Determination No. 96-54, Presidential Determination on Classified Information Concerning the Air Force's Operating Location Near Groom Lake, Nevada, 28 September 1996; and, Presidential Determination No. 97-35, Presidential Determination on Classified Information Concerning the Air Force's Operating Location Near Groom Lake, Nevada, 26 September 1997. *See also*, Kaza v. Browner, 133 F.3d 1159 (9<sup>th</sup> Cir. 1998).
- c. Absent a war or other exigent circumstances, however, it is highly unlikely that Presidential exemptions will be sought in the future to excuse federal facilities from complying with federal, state, or local environmental requirements.

## **V. FUNDING AND FEES VERSUS TAXES.**

- A. In the Army, funding for environmental compliance and restoration (cleanup) can come from four sources:
1. The Defense Environmental Restoration Account (DERA).
  2. Operations and Maintenance Account (OMA).

3. Research, Development, Testing, and Evaluation (RDT&E).
  4. Military Construction Account (MCA).
- B. The DERA was established by the Superfund Amendments and Reauthorization Act (SARA) § 211 (10 U.S.C. § 2703). Beginning in FY 97, Congress devolved the Defense Environmental Restoration Program (DERP), authorizing and appropriating funds for individual transfer accounts for the Army, Navy, Air Force, Defense Agencies, formerly used defense sites (FUDS), and the Office of the Deputy Under Secretary of Defense for Environmental Security (ODUSD (ES)).
1. The Army's transfer account is the Environmental Restoration, Army (ER, A) account.
  2. The ODUSD (ES) establishes cleanup goals for the Services and provides program management oversight, but the individual Services program, budget and manage their respective transfer accounts.
  3. Although the AEC develops the Army's installation restoration budget, ER, A funds are managed and distributed by the MACOM.
  4. Environmental Restoration (ER) funds shield installations from the immediate impact of funding environmental cleanups. Instead of using OMA or RDT&E money, ER funds are used to finance most installation-level restoration activities.
  5. Many restoration actions, however, will require long-term operation to be effective (*e.g.*, groundwater pump and treat operations). Current DOD policy is that ER funds can be used to finance operation and maintenance of restoration projects for 10 years. After that, operational and maintenance expenses must be funded with OMA money.
- C. Current compliance requirements (including training) must be satisfied through use of OMA money.
- D. Budgeting for major environmental compliance projects is accomplished pursuant to the A-106 process (Environmental Program Requirements Report (EPR), formerly the Environmental Pollution Prevention, Control, and Abatement at DOD Facilities Report (RCS 1383)). AR 200-1, para. 13-5.

1. Commanders must ensure that **all** pollution control projects and programs needed to achieve and maintain environmental compliance for the next 5 years are identified. Items identified (to include training) are divided into three categories:
  - a. Category I is for "must fund" requirements. Included within Category I are items necessary to resolve NOVs, necessary to meet promulgated standards whose implementation deadline has already passed, will pass in a current budget cycle, or are needed to support a signed compliance agreement.
  - b. Category II is for items necessary to meet established standards whose compliance date falls in a future budget cycle.
  - c. Category III is for items which will require replacement in the future because of physical or technological obsolescence, or needed to demonstrate environmental leadership.
2. The EPR Report satisfies the requirement in Executive Order 12088 that federal agencies submit to EPA detailed plans showing how they are budgeting sufficient funds to achieve and maintain environmental compliance. Installation compliance with the EPR process is likely to receive increased scrutiny in the future as compliance costs/demands increase and available funds decrease. The EPR Report also accompanies the President's annual budget submission to Congress. In imposing this requirement, Congress stated: "**[K]nowing that their input on environmental funding requirements is going to subject [them] to Congressional oversight will provide a greater incentive to base commanders to improve the accuracy and realism of their funding estimates.**" *National Defense Authorization Act For Fiscal Year 1991: Report of the House of Representatives Armed Services Committee on H.R. 4739, 101st Cong., 2nd Sess. 250 (1990).*
3. ELSs must play a prominent role in ensuring that the command understands what the **current** requirements are. To the extent possible, ELSs should also assist the command in forecasting **future** environmental requirements.

E. Fees and Taxes.

1. The Army's policy is to pay all nondiscriminatory administrative fees and assessments imposed by state and local governments for state and local permits and to defray the costs of their environmental programs.
2. Sovereignty, however, has not been waived for state taxation. "Excessive" environmental permitting and operating fees can constitute disguised taxes. States and local governments often assess three generic types of "fees" against federal facilities, which do not normally constitute reasonable service charges:
  - a. Remedial Fund Fee - Fees that fund cleanup activities, or mini-superfunds, do not constitute reasonable service charges and should not be paid. DOD conducts its own cleanups and receives no benefits from programs funded by these fees.
  - b. Broad "Program" Fees - States typically establish broad programs to address particular environmental media. Some program elements, such as permit review and processing, inspections, and compliance monitoring, may be paid as reasonable service charges. Other portions, such as special grant or loan programs of which we cannot take advantage, are objectionable and should not be paid. Commands must analyze these programs on a case-by-case basis and negotiate with regulators to determine the proportion of the fee to be paid.
  - c. Insurance-type programs - Many states require regulated facilities of certain types, especially underground storage tanks, to pay into an insurance fund that is available to help pay the cost of pollution caused by the facility. Because DOD funds its own cleanup efforts, payment of the fee violates the second prong of the Massachusetts test and the fiscal self-insurance rule.
3. The label placed on the requested payment is not important. A fee is an amount that, if calculated correctly, allows an agency to recover a reasonable approximation of the costs it incurs in acting on a license request and providing a benefit or a service. A tax is an enforced contribution to provide for the general support of the government.

4. A three-step test is used to determine if a "fee" is actually a tax (*see Massachusetts v. United States*, 435 U.S. 444, 464-67 (1978)). Under the Massachusetts test, determine whether or not:
  - a. The fee is imposed in a nondiscriminatory manner; i.e., are local governmental or other entities exempted?

--Theory: a tax can be discriminatory, but a valid permit fee or user fee cannot.
  - b. The fee is a fair approximation of the cost of the benefit received. The "benefit" is generally the overhead expense for operating the permit system and the costs of conducting inspections.
  - c. The fee is not structured to produce revenues that will exceed the total cost to the state of the "benefits" it confers. Fees that are structured to produce excess revenue are often structured so that all funds received are channeled into the state's general revenue fund.
5. If the charge is nondiscriminatory, a fair approximation of the cost of the benefit received, and not structured to produce revenues that will exceed the total cost to the state of the benefits it confers, then it will normally be a permissible fee.
6. **REMEMBER!** Unless the fee is discriminatory, some portion (i.e., the reasonable portion) of a state imposed fee is payable.

## **VI. ENFORCEMENT OF ENVIRONMENTAL LAWS.**

- A. EPA Enforcement Options. EPA has the primary regulatory authority and responsibility for the enforcement of most environmental statutes. EPA has three basic enforcement options when dealing with federal facilities: criminal prosecution (against individuals); civil judicial action (only against government contractors); or administrative enforcement actions.
- B. EPA's Enforcement Objectives:
  1. Ensure that the alleged violator is and will be in compliance;

2. Punish noncompliance;
3. Deter the alleged violator and others from not complying; and
4. Correct the harm caused by the noncompliance.

--EPA Enforcement Manual (1995).

C. EPA Enforcement Preferences.

1. Administrative and civil enforcement actions employ a strict liability standard and are, thus, generally favored over criminal enforcement actions that require a greater showing of culpability. Criminal enforcement actions are, however, normally initiated where there is egregious conduct and/or clearly culpable conduct that results in significant harm to human health and/or the environment.
2. Administrative cases are generally favored over civil enforcement actions because:
  - a. The proceedings at an administrative hearing are much less formal than those employed in the judicial process;
  - b. The Presiding Officer is an EPA employee as opposed to a district court judge; and
  - c. Civil judicial cases require review and approval by DOJ and EPA, as opposed to administrative determinations that require approval at the EPA Region level.
3. In addition, because the unitary executive doctrine precludes civil judicial action against federal facilities (except government contractors), administrative enforcement actions are the most common enforcement actions taken against federal facilities.

D. State Enforcement Actions.

1. Most environmental statutes contain provisions allowing EPA to delegate permitting, oversight, and enforcement responsibilities to the states, and the clear trend is to allow even greater state control and authority over federal activities and installations.
  - a. This system of delegation is known as “cooperative Federalism.” Under this system, the federal government establishes minimum standards and procedural requirements based on statutory mandates and the states develop implementation and enforcement programs that are no less stringent.
    - (1) Once the state has demonstrated that its program is no less stringent and capable of enforcement, the state assumes, subject to EPA oversight and right of revocation, enforcement authority. Once approved, actions taken under the state program have the same effect as if the EPA had taken the action. Even after delegation, however, EPA reserves parallel enforcement authority if it is dissatisfied with a State response.
    - (2) Delegation authority exists in RCRA, CAA, CWA, and the Safe Drinking Water Act (SDWA).
  - b. Some environmental statutes permit states to operate, subject to general preemption principles governing impediments to federal goals and procedures, a parallel program that is completely independent of the equivalent federal program.
  - c. Regardless of the type of program administered by the state, EPA will always retain at least concurrent inspection and enforcement authority.
2. In addition, explicit waivers of sovereign immunity have exposed federal installations to fines and penalties by the states, a trend that is also likely to continue.

- a. In 1992, the Federal Facility Compliance Act (FFCA) (Pub. L. No. 102-386, 106 Stat. 1505) explicitly waived the federal government's sovereign immunity for violations of RCRA. Prior to the enactment of the FFCA, the Supreme Court had held that the waiver of sovereign immunity in RCRA was not sufficiently explicit enough to allow states to impose punitive fines for past violations of RCRA. *See United States Department of Energy v. Ohio*, 503 U.S. 607 (1992). Note: the FFCA waived the sovereign immunity provisions of RCRA that are applicable to the management of solid and hazardous waste, but not the sovereign immunity provisions applicable to the management of underground storage tanks.
- b. The government's sovereign immunity for violations of Subchapter IV of the Toxic Substance Control Act (TSCA) was waived by the Lead Based Paint Hazard Reduction Act of 1992 (Pub. Law No. 94-469 (1992)).
- c. In 1996, the sovereign immunity provisions of the SDWA were amended to allow for the imposition of fines and penalties by the states.
- d. There is currently legislation before Congress to amend the sovereign immunity provisions of both the CWA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), to permit fines and penalties by the states for violations by federal agencies.
- e. As to the CAA, the current DOD position is that the waiver of sovereign immunity is not so explicit as to permit fines and penalties against federal agencies. This position is discussed in greater detail at Chapter IV, section III. E., *infra*.

#### E. Administrative Enforcement Actions.

1. Payment of fines and penalties. Penalties imposed by the EPA are typically assessed by determining a gravity-based penalty for a particular violation, considering any economic benefit, and adjusting the penalty for special circumstances. *See, e.g., EPA, Revised RCRA Civil Penalty Policy* (October 29, 1990), *reprinted in*, 21 Env'tl. L. Rep. (Env'tl. L. Inst.) 35,273 (October 1990).

2. The gravity-based penalty is determined by reference to a matrix that considers both the potential for harm and the extent of deviation from the RCRA requirement. Each violation is characterized as either “major,” “moderate,” or “minor” under each factor. The results are then compared on a matrix to determine the appropriate penalty range.
  - a. The "potential for harm" factor considers both the risks to human health and the environment and the adverse impact the violation may have on the RCRA regulatory process. As used in the penalty matrix, the different degrees of “potential for harm” are defined as follows:
    - (1) Major: the violation creates a substantial likelihood of exposure to hazardous waste (HW) or may have a substantial adverse effect on purposes or procedures for implementing RCRA.
    - (2) Moderate: the violation creates a significant likelihood of exposure to HW or may have a significant adverse effect on purposes or procedures for implementing RCRA.
    - (3) Minor: the violation creates a relatively low likelihood of exposure to HW or may have an adverse effect on purposes or procedures for implementing RCRA.
  - b. "Extent of deviation from the requirement" measures the degree to which the violation renders the requirement inoperative. As used in the penalty matrix, the different degrees of deviation are defined as follows:
    - (1) Major: the violation constitutes substantial noncompliance.
    - (2) Moderate: the violation significantly deviates from the requirement, but some of the requirements are implemented as intended.
    - (3) Minor: the violation deviates from the requirement somewhat, but most of the requirements are met.

3. Multiple penalties for each violation are a distinct possibility: "A separate penalty should be assessed for each violation that results from an independent act (or failure to act) . . . [that] is substantially distinguishable from any other charge." For example, where different elements of proof are required, multiple penalties are appropriate.
4. Multi-day penalties are also distinct possibilities. They "should generally be calculated in the case of continuing egregious violations. However, per day assessment may be appropriate in other cases."
5. EPA also attempts to recoup, as part of any penalty assessed, the Economic Benefit of Noncompliance.
  - a. The "benefit" is calculated based on computation of interest earned on avoided costs during period of noncompliance and marginal tax rate of company.
  - b. It would seem to be inappropriate for application to federal facilities.
6. There are a number of penalty adjustment factors.
  - a. Good faith effort to comply/lack of good faith can justify 25-40% reduction/increase in otherwise appropriate fine. Examples of good faith efforts:
    - (1) Self-audits.
    - (2) Internal disciplinary action.
    - (3) Anything else you're not *required* by RCRA to do to comply, *e.g.*, the EQCC or any of its working groups.
  - b. Degree of willfulness and/or negligence.
    - (1) Mitigation or aggravation of 25-40% may be justified.

(2) Factors: control over events, speed of remedy, foreseeability, and precautions.

- c. History of noncompliance (upward adjustment only, of 25-40%):  
"The [EPA] may find a consistent pattern of noncompliance by many divisions or subsidiaries of a corporation even though the facilities are at different geographic locations. This often reflects, at best, a corporate wide indifference to environmental protection." As a result of this, an installation's past compliance problems could subject it to a substantially enhanced fine.
- d. "Other unique factors" provision may permit argument of military-unique factors, e.g., short-notice deployment of personnel contributed to violation. These factors can either result in reduction or enhancement of the fine.

7. Sources of funds to pay fines and penalties.

- a. Congress prohibits the use of Environmental Restoration funds to pay fines and penalties for violations of environmental requirements (*see, e.g.,* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 321, 108 Stat. 2663 (October 5, 1994)).
- b. As a result, it is likely that fines and penalties will be paid out of O&M funds.

F. Criminal Enforcement. Each of the major environmental statutes contain provisions that provide for criminal sanctions, including fines and/or imprisonment.

1. Fines and penalties.

- a. Federal employees can be held individually liable for fines and penalties resulting from violations of most environmental statutes.

- b. Currently, only three statutes specifically provide that federal employees cannot be held individually civilly liable for environmental violations resulting from performance of their official duties; *see* 33 U.S.C. § 1323 (CWA); 42 U.S.C. § 7418(a) (CAA); and 42 U.S.C. § 6961 (RCRA).

## 2. Criminal liability.

### a. Generally.

- (1) While all major environmental statutes have criminal provisions for knowing violations, some permit prosecution for merely negligent acts. *See* CWA, 33 U.S.C. § 1319 (negligent release of a contaminant into navigable waters of the United States); and CAA, 42 U.S.C. § 7413(c)(4) (negligent release of a hazardous pollutant into the ambient air that places others in imminent danger).
- (2) In most cases, to establish a knowing violation, the government need only prove knowledge of the actions taken, not knowledge of the environmental statute itself. In addition, responsible officials who have knowledge of a wrongful act and the authority to take action, but fail to do so may also face prosecution.

### b. Trends.

- (1) The number of federal criminal prosecutions has been increasing steadily. Moreover, jail time adjudged by federal judges and actually served by individual defendants has also been increasing.
- (2) EPA has shifted its enforcement strategy from a quantitative pursuit of as many indictments and convictions as possible to a more qualitative pursuit of egregious conduct and environmental damage.
- (3) EPA has shifted its focus from corporate liability to personal liability.

c. Although the number of DOD personnel criminally prosecuted for violations of environmental statutes has been few compared with the overall number of federal and state prosecutions, to date sixteen DOD personnel have been prosecuted. Thirteen of the prosecutions were federal, and ten of the thirteen were convicted. Of the three prosecuted in state courts, two were convicted; the complaint against the third was dismissed after removal to Federal Court.

- (1) United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 499 U.S. 919 (1991) (the "Aberdeen Case"). In May 1989, three civilians (SES, GM-15, GM-14) of the Army Chemical Research and Development Command, Aberdeen Proving Ground, were convicted of various RCRA violations involving illegal treatment, storage, and disposal of hazardous wastes. The three were sentenced to three years of probation and 1,000 hours of community service. DOJ denied requests to reimburse them for attorney fees of about \$108,000 each. Matter of: William Dee, et al. -- Requests for Payments of Attorneys' Fees, Comp. Gen. Op. B-242891 (Sep. 13, 1991).
- (2) United States v. Carr, 880 F.2d 1550 (2d Cir. 1989). Mr. David Carr, a civilian range foreman at Fort Drum, was initially charged with 37 counts of violation of the Clean Water Act, four counts of illegal disposal of hazardous wastes in violation of RCRA, and the two CERCLA counts for which he was convicted. The indictment charged Carr with the supervision and direction of other civilian employees in the disposal of about 100 to 150 five-gallon cans of paint into a pond on the base. In December 1988, Carr was sentenced for two violations of CERCLA for twice failing to report a spill of hazardous substances. On each count, imposition of a prison sentence was suspended. Carr was given one year of probation; he also paid \$300 in fines and assessments.

- (3) United States v. Bond, Cr. 91-0287-GT, S.D. Cal (Apr. 9, 1991). Mr. Cletus Bond, a civilian employee of the Navy, pled guilty to one count of negligent discharge of pollutants (radiator fluid contaminated with anti-freeze) in violation of the Clean Water Act. He was sentenced to one year of probation and a \$500 fine. Mr. Bond was a supervisor at the Navy Exchange Auto Repair Facility, San Diego, California. The radiator fluid was discharged into a storm drain and flowed into a nearby Creek.
- (4) United States v. Pond, Cr. S-90-0420, D. Md. (Apr. 17, 1991), 21 Env. L. Rep. 10444 (1991). Mr. Richard Pond, civilian manager of the wastewater treatment plant at Fort Meade, was convicted in January 1991 of one felony count of violating a Clean Water Act permit, eight felony counts of making false statements on discharge monitoring reports, and a misdemeanor violation for theft of government property by using government lab equipment to analyze water samples for a privately owned wastewater treatment plant. Pond was sentenced to eight months in prison, followed by one year of supervised release (including four months of home detention), 60 hours of community service, and restitution of \$99.99.
- (5) United States v. Curtis, 988 F.2d 946 (9<sup>th</sup> Cir. 1993), *cert. denied*, 114 S. Ct. 177 (1993). From 1986 to 1989, John Curtis was the director of the fuels division at Adak Naval Air Station, Alaska. Among his responsibilities was the operation of several miles of pipelines. Over a five-month period spanning from October 1988 to February 1989, Curtis ignored repeated employee warnings of a pipeline leak. As a result, thousands of gallons of fuel flowed into an inlet of the Bering Sea. The employees finally took Curtis to the site of the leak, but the pipeline was not turned off until the base environmental manager was told what was happening. In October 1991, Curtis was indicted on five felony counts for knowing violations of the CWA. He was convicted in March 1992 of three violations of the CWA, one felony count for a knowing violation, and two lesser-included misdemeanor counts for negligent violations. Curtis was sentenced to serve 10 months in jail.

- (6) United States v. Dunn, Larimore, and Divinyi, Cr. No. 92-117-COL (JRE) (M.D. Ga. 1992). Three civilian employees (two GS-12s and one GS-11) at Fort Benning, Georgia, were indicted on 29 January 1992 for one count of conspiracy to violate the Endangered Species Act. Two of the individuals (the chief of the natural resources management division and the forestry supervisor) were also indicted on six counts of making false official statements. The chief of the environmental management division was also indicted on one count of making a false official statement. The offenses revolved around requests submitted from 1985-1989 for commercial timber harvesting at Fort Benning, on which requests defendants are alleged to have knowingly failed to note habitat of the red-cockaded woodpecker, an endangered species.
- (7) California v. Hernandez, No. 25148 (Riverside Mun. Ct. May 11, 1992). In March 1991, Mr. Andy Hernandez, sewage treatment plant foreman at March AFB, changed sludge test results for biochemical oxygen demand to bring the results within the level authorized by the plant discharge permit. Hernandez made these changes without doing any additional tests. In May 1992, Hernandez pled guilty to falsifying a wastewater test record. He was given a suspended sentence to pay a \$5,000 fine and placed on probation for 18 months.
- (8) United States v. Lewis, Cr. 3-88-50, S.D. Ohio (Dec. 14, 1988). Mr. Lewis, an Army employee and former Radiation Protection and Safety Officer at Wright Patterson Air Force Base, pled guilty to unlawful possession of a radioactive byproduct material.
- (9) United States v. Shackelford, E.D Va. (Feb. 27, 1992). Mr. Henry E. Shackelford, Jr., an employee at Langley Air Force Base, pled guilty to improper use and disposal of a pesticide.
- (10) United States v. Ferrin, S.D. Cal. (Aug. 15, 1994). Mr. James A. Ferrin, a supervisor at San Diego Naval Station, was convicted of disposing hazardous waste, treatment without a permit, and false statement.

- (11) California v. Lam, (Cal. State) (May 29, 1992). Mr. Sam Lam, an environmental manager at the Marine Corps' El Toro Air Station, was initially charged with felonies based on reports he caused to be dumped in a municipal landfill ninety 55-gallon drums containing leaded paint waste and heavy metals. In May 1992, Lam was convicted of five misdemeanor counts each for unlawful transportation and disposal of hazardous waste. He was sentenced on one count to pay a \$5,000 fine, ordered to complete a hazardous materials handling course, and placed on probation for three years. Sentencing on the remaining nine counts was suspended for the period of probation. The Navy/USMC concluded that while Lam's conduct was negligent, he had acted in good faith and, therefore, was within the scope of his employment. As a result, they supported his request that DOJ pay his private attorney's fees. DOJ approved Lam's request, authorizing payment of attorney's fees of up to \$90.00 per hour.

3. Representation. If a federal employee is indicted for an environmental crime, and it is a:

- a. Federal prosecution: representation will normally be provided by a private attorney hired at the employee's expense. *See* 28 C.F.R. § 50.15.

b. Representation by the U.S. Army Trial Defense Service (TDS).

- (1) Military personnel facing a criminal investigation conducted by EPA or other federal law enforcement agencies may request representation by TDS but “representation and advice will be limited to that required to protect the client from pending or potential judicial, nonjudicial or adverse administrative actions within DA.” TDS counsel are not authorized to advise military clients concerning concurrent civilian court or grand jury proceedings. *See* Standard Operating Procedures, U.S. Army Trial Defense Service (USATDS SOP), para. 1-6 (1 June 1994).

- (2) TDS counsel are able to provide “suspect counseling” in the critical period when an investigation is in its early stages; but once it is clear that adverse actions are going to be pursued outside the military; TDS counsel must withdraw from representation. *See* USATDS SOP, para. 1-5b(1)(j).
- c. State prosecution: representation by DOJ is possible if it is in the government's best interests (i.e., acting within scope of duties and not in violation of federal law). *See* 28 C.F.R. § 50.15.
  - (1) Satisfying the second prong of the test (not in violation of federal law), however, may prove especially difficult since many state environmental statutes are modeled after federal statutes.
  - (2) The Marine Corps, however, was recently able to persuade DOJ to pay (up to \$90.00 per hour) to represent a civilian employee charged with criminal violations of California environmental law. *See* discussion of California v. Lam at page 31 of this chapter.

#### 4. Attorney-client privilege.

- a. There is no attorney client privilege between an attorney and a commander on environmental compliance issues -- at least in cases involving federal investigations and prosecutions.
- b. Note, however, that the initial communication between a service member and a legal assistance or TDS attorney is privileged, but once it is determined that representation by a military attorney will no longer be available, the attorney-client relationship ends and further communications will not be covered by the privilege.

5. Official immunity in the environmental arena.
  - a. Basic requirements.
    - (1) Actions are necessary and proper; i.e., they are reasonably required to accomplish a government objective, task, or mission and they are taken with due regard for the safety, well-being, and property interests of others.
    - (2) The actions that were taken did not violate federal law.
  - b. Immunity is not available in federal criminal prosecutions; it is theoretically available in state prosecutions. Because most state environmental requirements are based on federal requirements, however, immunity will likely be precluded.

# **CURRENTLY "HOT" ENVIRONMENTAL LAW ISSUES**

## **VII. MUNITIONS AND RANGE ISSUES**

### **A. Military Munitions Rule**

1. 1992 amendments to Resource Conservation and Recovery Act (RCRA) directed EPA, in consultation with DoD, to promulgate regulations identifying when military munitions become hazardous wastes, subject to regulation under RCRA
2. Promulgated in Feb 97, the Military Munitions Rule excludes training (including firing, RDT&E, and range clearance on active/inactive ranges) and materials recovery activities from being classified as waste management activities; it also allows DoD storage and transportation standards to supplant environmental regulations under certain conditions
3. The Rule has withstood litigation challenges and is being adopted by more and more states, mostly without significant changes
  - a. Adopted with no changes: 29 states with delegated programs and 3 states with federal program; 7 states are considering adoption without substantial changes
  - b. Adopted with amendments: OR, AZ
  - c. Likely to be adopted with significant changes: CA, CO, WA, UT

### **B. Range Rule**

1. Background: EPA postponed the decision regarding the status of military munitions on closed, transferred, and transferring (CTT) ranges pending DoD's publication of the Range Rule which would govern military munitions at those areas
2. DoD published the Proposed Range Rule in 1997

3. Status: DoD, EPA, and the other Federal Land Managers are participating in discussions with the Office of Management and Budget as part of the interagency review process regarding the Draft Final Range Rule, the final step before promulgation of the Rule; publication is expected in January 2001
  4. Much is at stake because of this Range Rule
    - a. For the Army and DOD
    - b. For EPA and the state regulators
    - c. For states and localities
    - d. For the development community
    - e. For business and industry
  5. Litigation challenging any final rule is almost a certainty
- C. Interim Final Management Principles for Implementing Response Actions at Closed, Transferring, and Transferred Ranges (“Management Principles”)
1. Joint DoD-EPA interim measure signed in Mar 00 effective until DoD issues the final Range Rule; Army forwarded to field in Aug 00 with implementing guidance
  2. MACOMs and field organizations must consider Management Principles in planning and execution of response actions at CTT ranges
    - a. Management Principles adopt a process consistent with the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) to address unexploded ordnance (UXO) at a CTT range

- (1) Response activities include removal actions, remedial actions, or a combination of both, when necessary to address explosive safety, human health and the environmental hazards associated with a CTT range
- (2) Installations must resolve any concerns regarding EPA requests that are deemed unsafe
- (3) Consultation with regulators and other stakeholders on all response phases, except for certain emergency response actions

D. Massachusetts Military Reservation (MMR) and Army-Wide Implications

1. UXO and its constituents were identified as possible contributing sources of contamination of groundwater and soils associated with a sole-source aquifer that supplies local drinking water
2. Acting under authority of the Safe Drinking Water Act (SDWA), EPA issued two Administrative Orders (AO), providing for extensive EPA participation and oversight of the response action, establishing a citizens advisory committee to monitor the work, and ordering all use of lead ammunition, high explosive artillery and mortars propellants, and demolition of ordnance or explosives, (except for UXO clearance) to cease; in a third AO, EPA has ordered feasibility studies and removal of contaminated soil
3. EPA's actions at MMR have Army-wide implications because other installations have training areas that overlay sole-source aquifers or other environmentally-sensitive conditions; this has raised concerns about how to assess and moderate the impacts of military training elsewhere

## **VIII. ARMY FACILITIES AND ENVIRONMENTAL PENALTIES**

A. Background

1. Application of the Principle of Cooperative Federalism in the field of environmental law generally: centrality of enforcement mechanisms

2. Piecemeal and patchwork nature of sovereign immunity provisions under different environmental statutory regimes (SEE ATTACHED TABLE SUMMARIZING AUTHORITY-TO-FINE STATUS)
3. Waivers of sovereign immunity must be "unequivocally expressed," strictly construed in favor of the sovereign and not "enlarged beyond what the language requires." *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992).
4. Army's (and the other Services') relationships with EPA, states and localities
  - a. Sovereign immunity issues only apply to authority to pay punitive fines; Army installations are required to comply fully with substantive and procedural environmental requirements
  - b. Where sovereign immunity precludes payment of a fine, it should be used as a shield---not a sword; it is a very limited and problematic defense
    - (1) State and local regulators view the ability to fine as synonymous with the ability to regulate
    - (2) Violations at an installation where fines cannot be paid call into play the best negotiating efforts of the ELS, environmental staff, and command to quickly remedy any noncompliance and take affirmative steps (short of paying fines) to demonstrate the installation's commitment to environmental stewardship
    - (3) Aside from maintaining good relations with state and local regulators in general, failure to diplomatically assert sovereign immunity defense will cause state and local regulators to simply refer enforcement actions to EPA Regions, who delight in imposing large penalties

B. Developments Concerning Underground Storage Tank (UST) Penalties

1. December 1998 deadline to bring all Army USTs into compliance with RCRA has passed: EPA assessing fines for violations

2. Legal dispute over whether sovereign immunity has been waived for these penalties
  - a. Army's view (consistent with the other Services) is that the specific UST provision of RCRA subjecting federal facilities to federal, state, interstate and local requirements (42 U.S.C. § 6991f) was not amended by the Federal Facilities Compliance Act of 1992 to allow the assessment of fines and penalties
  - b. EPA's view (pushed by their Federal Facilities Enforcement Office (FFEO)) is that the FFCA's general waiver of sovereign immunity for the management of solid and hazardous waste (42 U.S.C. § 6961) is a sufficiently "clear statement" to provide the requisite authority for UST penalties
3. UST penalties dispute recently resolved
  - a. Installations in all of the Services have been assessed EPA penalties (Army: Walter Reed AMC and Fort Drum)
  - b. In Apr 99 the DoD General Counsel forwarded a letter and legal memorandum to the Attorney General (Office of Legal Counsel (OLC)) requesting resolution of the interagency UST dispute
  - c. For the UST enforcement cases that were pending before EPA Administrative Law Judges (ALJs)
    - (1) DoJ asked DoD to request stays in the proceedings until OLC issued its decision
    - (2) DoJ asked EPA not to oppose the stay requests
    - (3) Prior to the Air Force submitting a stay request in one of its cases, the ALJ issued an opinion adopting DoD's arguments; EPA appealed the decision to the Environmental Appeals Board (EAB) before requesting a stay
  - d. EPA continued to issue new fines for UST violations

- e. On 14 Jun 00, OLC opined that RCRA contains a clear statement allowing EPA to impose punitive fines against federal facilities for UST violations
- f. Air Force pursued relief from the EAB who did not address the merits of the case directly, but found there was no compelling reason to dismiss the OLC opinion
- g. Lesson learned: the experiences of all the Services in contesting EPA's UST authority via the EPA administrative litigation process has been uniformly positive; our conclusion is that the EPA administrative law judges are remarkably independent and impartial and that greater use of this forum should be explored in other appropriate cases

#### C. Developments Concerning Clean Air Act (CAA) Penalties

- 1. The CAA's federal facilities provision (42 U.S.C. § 7418(a)) contains a limited waiver of sovereign immunity with respect to state, interstate, and local air pollution control laws
  - a. Requires federal agencies to comply with air pollution control programs "to the same extent as any nongovernmental entity" and
  - b. Subjects them to the "process and sanctions" of regulators
- 2. The terms "process and sanctions" were interpreted **in the context of the Clean Water Act** by the Supreme Court in *DOE v. Ohio* (see above): the Court distinguished between
  - a. "Punitive fines" imposed as a penalty for past violations (no waiver of sovereign immunity) and
  - b. "Coercive fines" imposed to induce compliance with injunctions or other judicial orders designed to modify behavior prospectively (sovereign immunity is waived)

3. Split in authority over the interpretation of very similar sovereign immunity waiver provisions (the CAA provision cited above and the CWA interpreted in *DOE v. Ohio*)
  - a. District Courts applying *DOE v. Ohio* and holding there is no waiver under the CAA for punitive fines
    - (1) *U.S. v. Georgia Department of Natural Resources*, 897 F.Supp 1464 (N.D. Ga. 1995)
    - (2) *People of the State of California ex rel. Sacramento Metropolitan Air Quality Management District v. U.S.*, 29 F.Supp.2d 562 (E.D. Cal. 1998)
  - b. A Sixth Circuit Case, *U.S. v. Tennessee Air Pollution Control Board*, No. 97-5715, 1999 U.S. App. LEXIS16863 (6<sup>th</sup> Cir. Jul, 22, 1999), muddled the waters by holding that the CAA's savings clause in its citizen suit provision contains an independent waiver of sovereign immunity authorizing punitive fines against federal facilities; DoJ did not appeal that case because there was no split in the Circuits
  - c. Further confusion has recently been caused by the Ninth Circuit's treatment of the *Sacramento MAQMD* case noted above
    - (1) The Ninth Circuit vacated the district court decision and remanded the case because it found that the district court was without jurisdiction to hear the case as it had been improperly removed to federal court (215 F.3d 1005 (14 Jun 00))
    - (2) DoJ is seeking en banc review of the initial 9<sup>th</sup> Circuit's decision, and will likely pursue the case to the U.S. Supreme Court as the sweeping opinion on the removal issue stands to affect DoJ's ability to defend the United States in federal court on many environmental issues
    - (3) This setback means that resolution of the underlying sovereign immunity issue is likely several years away

**ARMY AUTHORITY TO PAY PUNITIVE FINES  
and YEAR AUTHORITY WAS RECEIVED**

Updated: 10 Aug 00

<b>STATUTE</b>	<b>IMPOSED BY STATE</b>	<b>IMPOSED BY EPA</b>
Resource Conservation and Recovery Act (RCRA) [Subtitles C and D only--re hazardous and solid waste] 42 U.S.C. §6961	YES—1992	YES—1992
RCRA [Subtitle I only—re underground storage tanks] 42 U.S.C. §6991f	NO	YES—2000 <sup>1</sup>
Safe Drinking Water Act (SDWA) 42 U.S.C. §300j-6	YES—1996	YES—1996
Clean Air Act (CAA) 42 U.S.C. §7418	NO <sup>2</sup>	YES—1997 <sup>3</sup>
Clean Water Act (CWA) 33 U.S.C. §1323	NO	NO

**NOTES:**

1. DoD disputed EPA's assertion that it has authority to assess fines against federal facilities for UST violations and referred the issue to the Department of Justice (DoJ) in Apr 99. On 14 Jun 00 DoJ released an opinion that concluded that amendments to RCRA in 1992 gave EPA the authority to assess UST fines against federal facilities. The issue was also challenged before EPA's Environmental Appeals Board, who deferred to the DoJ opinion.
2. Many states dispute the United States' position on this, and issue notices of violation that include assessments of fines. This issue was expected to have been settled through litigation in the 9<sup>th</sup> Circuit Court of Appeals, but that court recently issued a surprise ruling that the case should not have been removed from state court and remanded without addressing the central issue. DoJ will likely appeal to the Supreme Court on the issue of removing cases to federal courts. It will probably be several years before the sovereign immunity issue is settled nationwide. In the interim, installations will continue to assert the position of the United States (i.e., the sovereign immunity defense) except in the four states (KY, OH, MI, TN) of the 6<sup>th</sup> Circuit, where the court found that federal facilities must pay penalties imposed by state regulators for CAA violations.
3. The authority of EPA to impose fines stems from an amendment to the CAA in 1990. A DoD challenge to that authority was resolved in favor of EPA in a 1997 opinion by DoJ.

## **IX. CONGRESSIONAL OVERSIGHT OF ENVIRONMENTAL FINES**

### **A. The Catalyst: Fort Wainwright, Alaska (FWA)**

1. Aug 99: EPA Region 10 asserted a \$16 million Clean Air Act penalty against FWA – the largest penalty ever asserted against a federal facility
2. Penalty was based almost entirely two types of “business penalty” criteria
  - a. Two-thirds of the fine sought to recover the “economic benefit of noncompliance”---charged to FWA but designed to recapture the net gain realized by the “Federal Government” (i.e., taxpayers) as the result of FWA’s delayed and avoided costs of compliance
  - b. Nearly one-third of the penalty was based on the “size of the business,” a 50% penalty surcharge intended to ensure that businesses feel the deterrent sting of enforcement in proportion with their wealth (i.e., capital assets that can be liquidated to pay for compliance or fines)
3. This is a test case for HQ EPA’s new two-pronged strategy for enforcing environmental laws against federal facilities
  - a. First, EPA asserts the statutory maximum fines in its complaints, regardless of whether the alleged violation is major or minor, and then uses business penalty criteria to develop a highly inflated amount as a “negotiating position”
  - b. EPA regions now generally refuse to provide penalty calculations, often making it difficult to determine the degree to which business criteria have been used to inflate the asserted penalty
  - c. This “inflate and then stonewall” tactic has made local good faith resolution of civil enforcement actions extremely difficult
  - d. The Army and DoD view business penalties as a floodgate for greatly increased fines by employing means that are inapplicable to federal facilities for both legal and policy reasons

B. The Reaction: FY 00 Defense Appropriations Act Rider

1. The enormity of the asserted penalty and the application of business penalty criteria in the FWA case prompted Senator Stevens (Chair, Appropriations Committee) to add a rider to the FY00 Defense Appropriations Act that prohibited DoD from paying any environmental fine without Congressional approval
2. DoD neither requested nor endorsed the rider; this provision has slowed down Army's ability to conclude enforcement actions with all regulators in both large and small cases
3. Intended as a warning to EPA about its new enforcement strategy, this rider was attacked by EPA as a measure that would encourage DoD to relax its compliance responsibilities
4. State government leaders also vigorously protested against this legislation as a direct attack on their ability to regulate DoD.

C. The Next Round: FY 01 Defense Authorization Act?

1. Senate Armed Services Committee (SASC) proposed a permanent requirement in the FY 01 Defense Authorization Act (Section 342, supported by Senator Stevens) requiring Congressional approval prior to payment of any environmental penalty in excess of \$1.5 million
2. As originally written, Section 342 would have also prohibited payment of any environmental penalties, regardless of amount, that were based in whole or part on "the application of economic benefit criteria or size-of-business criteria" unless Congress specifically approved payment
3. In its report, the SASC noted that business penalty criteria are designed for "market-based activities, not government functions subject to Congressional appropriations" and that it would not approve penalties that were based on business criteria
4. On 12 Jul 00, in a compromise between Senators Stevens and Kerry, the Senate agreed to delete any mention of business penalties; in addition, the Senate modified the provision requiring Congressional approval prior to payment of a fine in excess of \$1.5 million in two ways:

- a. It converted the requirement from a permanent provision to a three year trial period
  - b. It made the restriction applicable only to fines imposed by a federal environmental agency
- 5. On 13 Jul 00, the Authorization Bill passed the Senate and was sent to joint conference
  - a. The House version of the FY 01 Authorization Act contains no provision on these issues, so it is uncertain how Section 342 will fare
  - b. Recently, EPA has made efforts to staff within the Administration a letter to the joint conference in opposition to Section 342, as amended, as well as the original SASC report on it; DoD has objected to EPA's attempts to finesse its views on business penalties as those of the Administration

D. The Future of Business Penalties---The Centerpiece of EPA's New Strategy?

- 1. If Congress enacts Section 342, as amended, it is not expected to have much impact on the administrative litigation pending between EPA Region 10 and FWA – although the \$1.5 million threshold for Congressional approval of a fine or penalty may serve as a negotiating cap
- 2. Even if the settlement is below the “cap,” but above the figure that a normal “gravity based penalty” would warrant, EPA will likely take the view that such a settlement could have at least been influenced by business penalty criteria; accordingly, a settlement in that range could encourage EPA to continue its efforts to apply business penalty criteria to federal facilities
- 3. If FWA is unable to reach a settlement with EPA based only on gravity penalty criteria, it will press for a hearing on the issue before an EPA administrative law judge

4. Although DoD has made efforts to resolve the issue of business penalties within the Administration, the issue has yet to be fully vetted; in light of the political situation that accompany an election year, it is unlikely that this avenue will lead to a resolution of the controversy between DoD and EPA
5. At present, the principal avenue for addressing the legal concerns raised by EPA's enforcement strategy is through the EPA administrative litigation process

## **X. ROLE OF THE ENVIRONMENTAL LAW SPECIALIST (ELS)**

### **A. Background**

1. TJAG Policy Letter 85-7 (13 Dec 85)
  - a. Designate Army lawyer for "comprehensive legal services to the command on environmental matters" at each installation
  - b. Ensure ELS is qualified and appropriately trained
  - c. Emphasize importance of environmental matters to commanders
2. Updated Policy Letter by message of 30 Oct 92
  - a. Advised of passage of the Federal Facilities Compliance Act and the broad waiver of sovereign immunity for punitive fines for violations related to solid and hazardous waste requirements
  - b. Reminded SJAs of imperative to have ELS designated to assist the command on environmental matters
3. TJAG Policy Memorandum 94-7 (2 May 94)
  - a. Reemphasized importance of designating and training an ELS at every Army installation

- b. Encouraged proactive role of SJA and ELS in keeping command informed of potential impacts of environmental requirements on military activities
  - c. Requested ELSs to effect early coordination of environmental issues through MACOM and Regional Environmental Offices technical chains
- 4. Current TJAG Requirements (Article 6 Checklist for SJAs) further stresses importance of developing strong ELS capabilities at installations
  - a. Detailed guidance on importance of and role of ELS in all aspects of environmental law at the installation level
  - b. Emphasizes ELS involvement in planning, execution, and monitoring of environmental programs; practicing of preventive law to keep thorny scenarios from developing
  - c. Reminds of requirements to report and coordinate enforcement actions through MACOMs to ELD (AR 200-1)

B. Role of the Environmental Law Division (ELD) vis-à-vis the ELS

- 1. Advise and assist, in coordination with or through MACOM ELS and, in appropriate cases, Regional Environmental Office counsel, on substantive environmental legal issues
  - a. Done on ad hoc basis and through routine efforts: monthly ELD Bulletin and news flashes; semi-annual workshop for MACOM ELSs
  - b. Some issues, such as challenges to environmental fees, require close coordination with other Army and DoD installations in the state, and with non-DoD facilities; this is done with the assistance of Regional Environmental Offices
  - c. Reduced manning at ELD requires leveraging of technology

- (1) All ELSs have access to Air Force environmental materials on FLITE at no cost (POC at ELD is MAJ Liz Arnold, 703-696-1593 [elizabeth.arnold@hqda.army.mil](mailto:elizabeth.arnold@hqda.army.mil) for accounts and passwords)
- (2) Need email for every installation ELS to allow electronic transmission of bulletins, news flashes, and to enhance ability to pass information to ELS on case-specific issues (POC is MAJ Arnold)
- (3) Useful websites---springboards to environmental law:
  - (a) Air Force FLITE-environmental law:  
<http://envlaw.jag.af.mil/>
  - (b) DENIX (every ELS should be a subscriber to this site = Defense Environmental Network):  
<http://www.denix.osd.mil/denix/DOD/dod.html>
  - (c) EPA home page:  
<http://www.epa.gov/epahome/locate1.htm>
  - (d) State regulatory references:  
<http://www.sso.org/ecos/states.htm>
  - (e) EPA Administrative Law Judge decisions:  
<http://www.epa.gov/oalj/index.htm>
  - (f) Environmental Appeals Board decisions:  
<http://www.epa.gov/eab/>

## 2. Enforcement action expectations

- a. ELD is not staffed with a “SWAT” team to respond to enforcement actions by state or EPA regulators; the installation ELS is the point-person on each case; the ELD action officer for enforcement issues stands in an advise-and-assist role

- b. In cases where an issue of Army-wide importance is raised, ELD often ghost-writes motions and briefs for the ELS and may assist in arguing cases before administrative tribunals; otherwise, ELD travel in connection with an enforcement action is rare
- c. Enforcement actions should be closely coordinated with ELD, in association with the MACOM ELS, so that the benefits of a litigation team approach can be achieved